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IN THE
Supreme Court of the United States
October Term, 1941

No. 1182

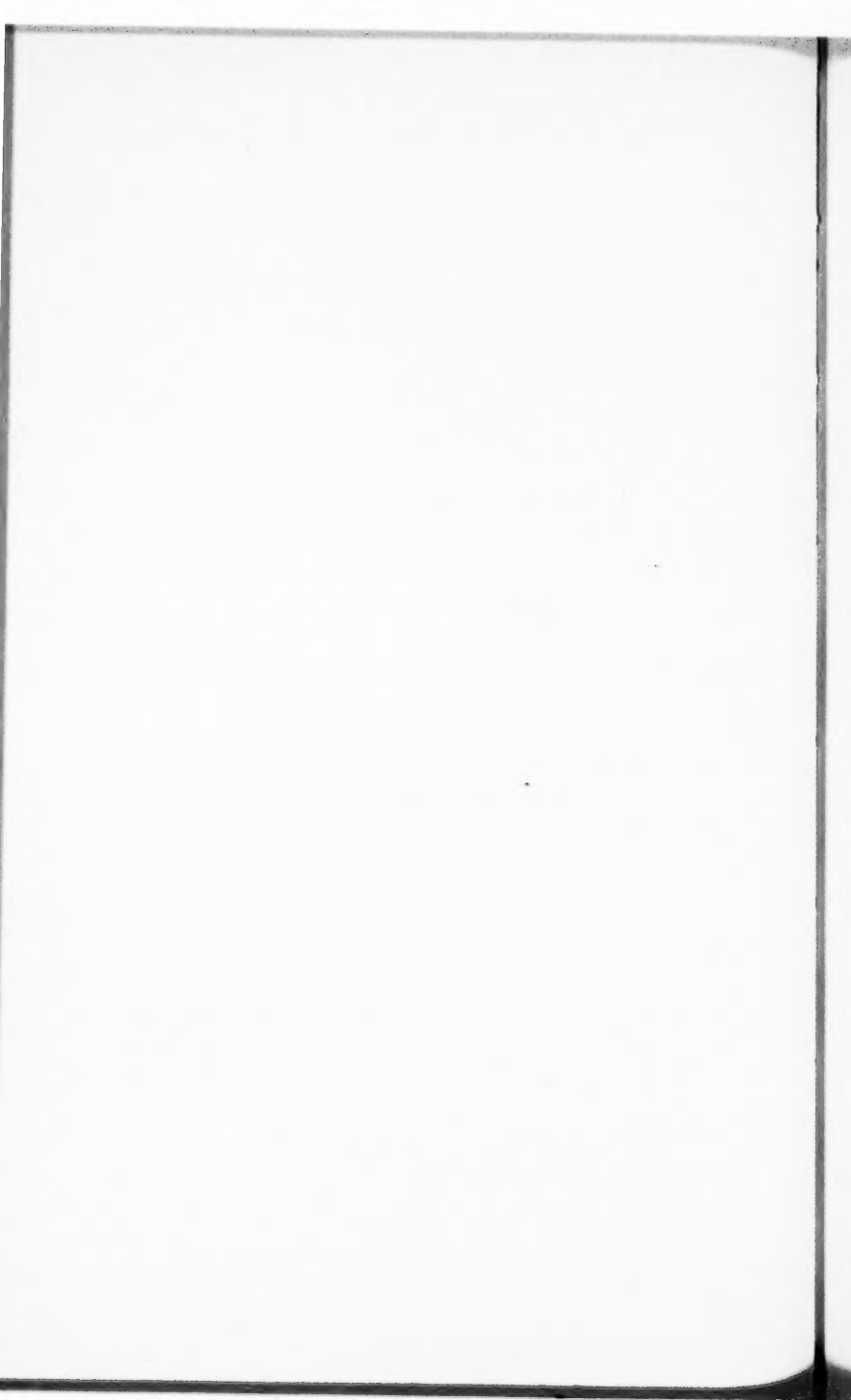
LOUIS N. ROSENBAUM, *Petitioner*

against

FREDERICK BROWN

**Petition of Louis N. Rosenbaum
for Writ of Certiorari to the Supreme Court of the
State of New York, County of New York; and
Brief in Support Thereof**

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IN THE
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October Term, 1941

No.

LOUIS N. ROSENBAUM, *Petitioner*

against

FREDERICK BROWN

**Petition of Louis N. Rosenbaum
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State of New York, County of New York; and
Brief in Support Thereof**

*To the Honorable Harlan Fiske Stone, Chief Justice of the
United States, and the Associate Justices of the
Supreme Court of the United States:*

The petition of Louis N. Rosenbaum, a citizen of New York, respectfully shows:

Your petitioner seeks review of a determination of the Court of Appeals of the State of New York (287 N. Y. 510) on March 5, 1942, affirming a judgment directed (one judge dissenting) by the Appellate Division, First Department, of that State, in favor of Frederick Brown as plaintiff against Louis N. Rosenbaum (the petitioner herein) as defendant, for the sum of \$13,491.02. The latter judgment reversed the judgment of the Trial Term, New York County, dismissing the plaintiff's complaint on the merits.

The Court of Appeals remitted the record to the Supreme Court of the State, County of New York; and this latter court on March 12, 1942, entered a judgment making the determination of the Court of Appeals its judgment.

Federal Statute Involved

The judgment was predicated on a construction of the federal statute which imposes individual liability for assessment against stockholders of national banks. (Dec. 23, 1933, c. 6, § 23, 38 Stat. 273, 12 U. S. C. A. § 64.) It reads as follows:

“Individual liability of shareholders; transfer of shares.

“The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability, but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure.”

Nature of the Action

This is an action at law. It is brought to enforce an alleged liability of the defendant to pay to the plaintiff the sum paid by the latter's assignor (Blumenthal) in satisfaction of an assessment levied against him as a stockholder of record in the Harriman National Bank within sixty days prior to its failure to meet its obligations.

The Harriman National Bank was, as is conceded in the Record (fol. 973), insolvent “by a large sum” on

Friday, March 3, 1933. It never opened after the close of business on that day. A Conservator was appointed for it on Monday, March 13, 1933, by the Controller of the Currency. A Receiver was appointed on October 16, 1933.

Within sixty days prior to March 3, 1933, Blumenthal sold his stock in the bank. Thereafter, but prior to March 3, 1933, this stock went through several transfers of record upon the books of the bank.

On March 6, 1933, three days after the bank closed its doors never to open again, the defendant Rosenbaum placed with a broker an order to buy 92 shares of its stock. No shares of stock were delivered to him personally until April 11, 1933 (R. p. 411, Ex. 33); but the Appellate Division and the Court of Appeals held that 86 of these shares were allocated and delivered to his agent on or before Saturday, March 11, 1933.

On March 3, 1933, Governor Lehman of New York by proclamation "closed" all banks, thus suspending banking transactions throughout the State on Saturday, March 4 and Monday, March 6, 1933 (fol. 1057). At 1:00 A. M. on March 6, 1933, the President of the United States by proclamation "suspended" "all banking transactions" throughout the country (see Pl. Exs. 9 and 10, pp. 353-386). The President's action permanently closed every bank and suspended its operations unless and until it received "a license to reopen for the performance of all usual and normal banking functions" (fols. 1147-9, 1153, 1059, 1079).

The Secretary of the Treasury immediately began an investigation of the affairs of the Harriman Bank as of March 3, 1933, through an examiner then placed in charge (fols. 1263-4, 955, 961-4, 972-3, 991-2, 88-9, 133, 1066-7). The examiner speedily discovered that as of that date the bank was insolvent "by a large sum" (fols. 972-4). Accordingly, the bank received no license and remained closed. The suspension of its regular banking operations on March 3, 1933, including, of course, the meeting of its regular banking obligations, was permanent.

On November 13, 1934, the Controller of the Currency made an assessment and requisition against stockholders of the Harriman National Bank who were such on *March 3, 1933* or within sixty days prior thereto (fols. 88-9, 132-3). Under this assessment Blumenthal paid \$10,238.28.

On the ground that the defendant was, within the sixty days contemplated by the statute, the owner of 92 of the shares of stock which Blumenthal had transferred to others within that period, the plaintiff, as Blumenthal's assignor, brought this action at law to recover from the defendant the assessment paid by Blumenthal so far as it covered these 92 shares (fol. 17).

The Appellate Division and the Court of Appeals granted the plaintiff a judgment as to 86 of these shares (262 App. Div. 136; 287 N. Y. 510).

The Federal Questions Involved

The Trial Court held: (1) that under the Federal Statute the 60-day period terminated with March 3, 1933 (fols. 1313-20), and (2) that, even were this otherwise, nevertheless under the Federal Statute there was no obligation on the defendant to indemnify Blumenthal, since there was no quasi-trust relationship between them (fols. 1296-1302) (175 Misc. 295).

The Appellate Division by a divided Court took the contrary view on both points (fols. 1366-85) (262 App. Div. 136). So, also, did the Court of Appeals of the State.

The Court of Appeals said (287 N. Y. 510, 515):

"Two questions of law remain, which must be decided upon this appeal: *First*. Was the date of the bank's failure 'to meet its obligations,' at which time the statutory liability of stockholders attached, March 3, 1933, before the defendant purchased his stock, or March 13th, after the stock was delivered to defendant? *Second*. May a stockholder who has transferred his stock within sixty days before the date of the fail-

ure of the bank to meet its obligations and who, for that reason, has been compelled to pay a judgment recovered against him in an action brought to enforce the statutory liability imposed on stockholders of banking associations, maintain an action for reimbursement against the stockholder who had become the owner of the stock at the date of such failure through delivery from persons to whom it had been previously transferred?"

The Court of Appeals then reviewed the proclamation of the President, the interpretation and application of the Federal Statute, the effect of the Comptroller's fixation of the 60-day period as terminating March 3, 1933, and various Federal decisions by this and other Federal Courts.

Concerning the first point the Court of Appeals concluded that under the Federal Statute (p. 517):

"The date of such failure ('to meet its obligations') arrives only when a bank fails to open or refuses to meet its obligations which then have matured though other banks are open and carrying on their business without restriction. The Comptroller of the Currency is not charged with responsibility to fix that date. It is fixed according to statute by an act of default, not by an act of insolvency, and the courts must determine when such an act has occurred. Here, it is shown, as matter of law, the act occurred on March 13, 1933, and that date cannot be altered by any administrative ruling."

As to the second point the Court of Appeals said (p. 520):

"Unlike the New York statute the federal statute imposes liability for the same obligation upon persons between whom there may be neither privity of contract nor privity of estate, and here the plaintiff asserts that as between these persons the beneficial owner of the stock at the date when liability attached should have discharged the obligation. * * * The stat-

ute clearly indicates that Congress intended that the ultimate transferee should be under a primary duty to meet the liability for all other persons who were made subject to the liability only to the extent that such transferee failed to meet it."

Reasons for Allowance of Writ

The writ of certiorari should be granted:

(1) To settle the interpretation of the Federal statute as to the time when the 60 day assessment period terminates where a bank ceases regular banking operations and because of insolvency on that date never resumes.

(2) To settle the interpretation of the Federal statute as to whether such statute (as held by the Court of Appeals) does in fact contemplate that the primary obligation to pay the assessment is on the beneficial holder at the end of the 60 day period, and that he must indemnify a prior holder, notwithstanding that there have been several intervening transfers of record before such beneficial owner acquired his interest.

(3) To settle the conflict which the Court of Appeals itself avowed (287 N. Y. 510, 517-8) between its decision and the action of the Comptroller of the Currency in fixing March 3rd as the end of the 60 day assessment period. Obviously the decision of the Court of Appeals invalidates any assessments levied by the Comptroller on stockholders who were, but ceased to be, such within the first ten days of the period fixed by him.

(4) To settle the conflict (as we see it) between the decision by the Court of Appeals and the decisions by this Court and certain other Federal courts cited in the accompanying brief.

(5) Conceding, as apparently does the Court of Appeals (p. 516) and as numerous decisions by this Court and other Federal courts conclusively decide, that the rights of creditors must be deemed frozen as of the closing and accompanying insolvency on March 3, 1933, is the fixation of the obligations of the stockholders as debtors to be as of some other and later date?

These questions are of general importance not only to the great body of litigation which grew out of the wholesale bank failures of 1933, but also to the future administration of this Federal statute.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of New York, County of New York, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and of all proceedings in the case entitled Frederick Brown, Plaintiff, against Louis N. Rosenbaum, Defendant, and that the determination of the Court of Appeals of the State of New York and the judgment thereon may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just;

And your petitioner will forever pray.

Dated, April 24, 1942.

Respectfully submitted,

LOUIS N. ROSENBAUM,
Petitioner,

By CHARLES H. TUTTLE,
Of Counsel.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the Trial Court is reported in 175 Misc. 295, and the opinion of the Appellate Division is reported in 262 App. Div. 136. These opinions also appear at pages 428 and 453 of the Record. The opinion of the Court of Appeals is reported in 287 N. Y. 510, and is also printed as Appendix A hereto.

ARGUMENT

POINT I

Since the Harriman Bank was hopelessly insolvent on March 3, 1933, and never thereafter met its regular banking obligations, and since the Comptroller took it in charge on that date through an examiner, the subsequent continuance of the Comptroller's control by appointment of a conservator was merely an administrative recognition of the true nature of the suspension in the case of the Harriman Bank. As of that date, not only the rights of creditors but also the obligations of debtors (including stockholders under assessment) became and have been fixed.

Hence, inasmuch as the defendant did not contract to buy stock of the Harriman Bank until some days later, he was not assessable under the Federal Statute and could not be liable to indemnify Blumenthal.

A person who, like the defendant, acquires bank stock after the bank has ceased to do a regular banking business "under a mandate of the state", is not subject to liability for assessment or indemnity "so long as the bank remains closed."

Broderick v. Aaron (Kornberg), 268 N. Y. 260, 266-8;

Broderick v. Adamson (Greif), 270 N. Y. 260, 264-5;

People v. Merchants Trust Co., 116 App. Div. 41, aff'd 187 N. Y. 293.

Under the Presidential and Gubernatorial Proclamations, and by reason of its then hopeless insolvency, the official suspension of the Harriman Bank on March 3, 1933, was permanent. Thereafter the bank never transacted a regular banking business and never met its regular banking obligations. The bank could not and did not obtain a license to reopen.

(1) The appointment of the conservator on March 13 was not the creation of an insolvency or of an inability and failure on the part of the bank to meet all its regular obligations. It was merely the date of administrative recognition of these basic facts as existing on March 3. The prior existence of these facts had required a little time for examination and ascertainment.

The Comptroller had taken the bank in charge through an examiner on March 3 (fols. 1263-4, 955, 961-4, 972-3, 991-2, 88-9, 133, 1066-7). He continued his control through another administrative officer on March 13.

From March 3 the bank was in custodial conservatorship by the Treasury Department and could not act without the Department's permission (fols. 1066-7, 1078-9, 1085, 1147-9, 1153, 1059).

The bank was then and thereafter as much in conservatorship by the Department as if an agent with a title "conservator" had been appointed at once. Under the National Banking Act (§ 203) a conservator is merely the Comptroller's agent to take possession and to "take such action as may be necessary to conserve the assets of such bank pending further disposition of its position as provided by law." Precisely this was what the Comptroller himself did as of the date of these executive proclamations.

(2) Moreover, the Presidential and Gubernatorial Proclamations did more, and were intended to do more, than create "a bank holiday" at the end of which each bank would as of course resume where it had left off. On the contrary, by those proclamations the continuous conservation of assets was intended, and the Comptroller immediately took each bank in charge through an examiner. Each bank was permanently closed and in charge of the Comptroller unless and until it received from him "a license" "to reopen for the purpose of all usual and normal banking functions" (fols. 1147-9, 1153, 1059, 1079).

In other words, this particular holiday included the purpose of enabling the proper banking authorities, at a time when all banks were suspended, to determine by examination as of the initial date of such suspension, which were in a position to reopen under the dire financial conditions of the depression, and to keep closed those which were found to be insolvent. The Secretary of the Treasury thereupon found the Harriman Bank to be insolvent "by a large sum" as of March 3, 1933 (fols. 972-4). Hence, for that bank the "holiday" had and could have no end. The closing was permanent, and the rights and obligations of all parties became and were fixed as of that date.

(3) Furthermore, the entire basis of the stockholders' liability is predicated on the theory that depositors should be able to determine from the list of stockholders whether they desire to deposit and to insure vigilance over management.

Obviously, this reason for double liability could not run beyond the moment when the bank closed its doors on Friday, March 3, 1933. At no time while the bank was still open for deposits in the regular course of banking business, would any depositor have seen the name of the defendant on the stock records. No debt was contracted or could have been contracted on the strength of his responsibility as a stockholder.

Such deposits as were received after March 3 were kept segregated (fol. 164), each being carried in a separate trust account and available for immediate refund, unmingled with the general assets and liabilities of the bank (fols. 1092-6). They were not made on the general credit of the bank.

So, likewise, all management of the Harriman National Bank by its officers and directors as a going concern conducting an ordinary banking business ceased when the bank closed its doors on March 3, 1933. Thereafter the bank was continuously in charge of the Comptroller, first through his examiner and later through his conservator and subsequent receiver.

Thereafter, also, neither the management nor any stockholder could have discharged responsibility for banking operations in the ordinary sense, for there were no such operations. No new liabilities could be incurred.

POINT II

Moreover, the Treasury Department itself fixed the sixty-day period for assessment as terminating on March 3, 1933.

The force of that decision and of that practical construction is obvious, and our State Court of Appeals had no power to modify it or to fix a different period.

(1) The plaintiff himself called as a witness Mr. John M. Jordan, the Comptroller's assistant in charge of the levying of the assessment in the case of the Harriman Bank.

On direct examination by the plaintiff's own counsel, Mr. Jordan testified that notices of the assessment were sent to all who were stockholders of record on March 3 and to "all sixty-day transferees." To quote (fol. 89):

"Q. By sixty-day transferees you mean what? A. Anybody who sold stock, transferred stock, within sixty days prior to the Bank's closing.

"Mr. Tuttle: What day was that?

"The Witness: March 3, 1933.

"Q. That was when it closed, as all banks did at the inception of the Bank Holiday? Is that right? A. All banks in the State of New York were closed by Proclamation of the Governor; and the next day, the Saturday, the President of the United States closed all banks in the United States."

And on cross examination Mr. Jordan testified in answer to a question by the Court (fol. 133):

"By the Court:

"Q. When you say within the sixty-day period, do you fix a specific day for the sixty-day period to begin? Do you make it March 3rd? A. March 3rd.

"Q. Within sixty days of March 3rd you call the sixty-day period? A. That is right.

"The Court: Very well."

(2) This is further established by the Treasury Department's Circular Letter No. CR-7 (next Point hereof), and by the fact that the Comptroller examined the bank and determined insolvency as of March 3, 1933 (fols. 955, 961-4, 972-4).

(3) It is true that on January 4 and January 15, 1935, the Receiver sent to the defendant Rosenbaum an assessment notice on 35 and 57 shares respectively (fols. 1036, 1048). Both these notices merely stated that "You *are* the owner of" these respective shares (fols. 1037, 1049). Neither notice stated when Rosenbaum became, or was claimed to have become, such owner; and, of course, he was not in law liable to assessment simply because he was the owner of shares in 1935. Apparently at that time, and since Rosenbaum never became a stockholder of record at

all, these notices were sent as a precautionary measure, the Receiver not knowing but that Rosenbaum may have acquired his interest in the stock within the Comptroller's sixty-day period, to wit, on or prior to March 3, 1935.

(4) Under Title XII of the United States Code, Annotated, having to do with "Banks and Banking," Sections 14, 203 and 211, the Comptroller of the Currency had the familiar power to make, fix and levy the assessment, including all operative decisions connected therewith. The principle that such decisions by the Comptroller in the exercise of his functions under the National Banking Laws will not be reviewed or modified by the courts is familiar and well settled.

Liberty National Bank v. McIntosh, 16 F. (2d) 906, 909 (C. C. A.);

Kennedy v. Gibson, 75 U. S. 505;

Adams v. Nagle, 303 U. S. 532, 540;

District of Columbia v. Wardell, 32 F. Supp. 769, 771;

Church v. Hubbard, 91 F. (2d) 406;

Way v. Camden Safe Deposit & Trust Company, 21 F. Supp. 700.

POINT III

Indeed, the Treasury Department not only fixed March 3, 1933, as the termination of the sixty-day assessment period for the Harriman Bank, but it made a general ruling that, as to any bank which failed to reopen because of insolvency on the date of the Gubernatorial or Presidential Proclamation, such date should be deemed the official date of closing as of which the basic deficiency should be calculated and the respective rights and obligations of the creditors and the debtors (including shareholders) should be deemed fixed.

(1) The Circular Letter of the Treasury Department (Circular Letter No. CR-7 of June 9, 1933), in evidence as Defendant's Exhibit I (p. 421, fol. 1261), is entitled as follows:

“Concerning the determination of the official date of closing of banks in conservatorship or receivership under banking holiday proclamations or acts.”

This Circular Letter declares (the italics being ours):

“Prior to the emergency in the banking situation resulting in banks being closed under banking holiday proclamations issued by the States, or under the subsequent Presidential proclamation of March 6, 1933, the official date of closing of a bank for liquidation and set-off purposes was easily determined. Such date was either the date a bank voluntarily closed by action of its board of directors suspending its operation or the date of involuntary closing of the bank *by action of the Comptroller taking it in charge through a receiver or examiner*. However the determination of the official date of closing since the issuance of such proclamations is a more difficult matter, and the following rules have been worked out as a basis of fixing such date:

"1. Where prior to the Presidential proclamation, a banking holiday Proclamation or act was issued by the State in which the subject bank is located, and the bank immediately thereafter closed in pursuance of such State proclamation or Act, *such date of closing should be taken as the official date of closing, assuming such bank thereafter remained closed.* * * *

"4. Where a bank continued in operation to March 6, 1933 (notwithstanding it may have been upon a restricted basis as explained above) but closed on March 6th and thereafter remained closed, the official date of closing of such bank will be March 6, 1933. * * *

"5. The date of appointment of a conservator or receiver (as the case may be), for a bank which was, at the time of such appointment already closed by Presidential Proclamation of March 6, 1933, or under a State Proclamation, is not to be taken as the official closing date of the Bank, inasmuch as the conservator or receiver was not appointed until subsequent to the actual closing of the bank. Consequently, the official closing date should be determined in accordance with the principles indicated in numbered paragraphs (1), (2), (3) and (4) above, regardless of the date of appointment of the conservator or receiver. * * *

"8. The official date of closing of a bank having been fixed in accordance with the foregoing instructions, it follows that as a general rule (subject to exceptions indicated in specific instructions from time to time issued), the rights of all depositors and creditors of a bank are fixed or 'frozen' as of the official date of closing of such bank."

(2) The principle that such operative decisions made by the Comptroller of the Currency in the exercise of his functions under the National Banking Laws will not be reviewed by the courts, is familiar and well-settled. See Point II, *supra*.

It is obvious that Circular Letter No. CR-7 falls within this well-settled principle.

This was squarely held concerning this very Circular Letter in *Bryce v. National City Bank of New Rochelle* 17 F. Supp. 792, aff'd 93 Fed. (2nd) 300 (Second Circuit), where the court decided that the rights and duties of all parties as regards the bank as a going concern came to a fixation on March 4, 1933, when the bank was in fact insolvent and ceased to do a regular banking business as a result of the Governor's Proclamation.

After quoting paragraphs "1", "5" and "8" of Circular Letter CR-7, the District Court concluded (p. 798):

"As to such matters of administration which are left to the discretion of the Comptroller of the Currency, his powers are plenary and not subject to court review."

(3) The Appellate Division's opinion argues (fol. 1374) this this Circular Letter "simply fixed a date for the adjustment of the rights of creditors and depositors".

That argument overlooks that even if (contrary to the plain fact) this was all that there was in this Circular Letter, such a date would necessarily also be the date as of which the deficiency for the purpose of assessing stockholders would have to be determined. Indeed, that was the very date as of which the Treasury Department levied the present assessment. See Point II, *supra*.

(4) The case of *Pyne v. Jackman*, 12 Fed. Supp. 653, cited by the Appellate Division (fol. 1372) did not concern the Harriman Bank and is easily distinguishable.

In the first place, in that case there was not, as there is here, proof of insolvency on March 3, 1933. The court expressly said (p. 655) the insolvency on that date could not be implied solely from the fact that a conservator was later appointed on March 31, 1933.

In the second place, the *Pyne* case was not a final decision. While it granted the defendant's motion to dismiss the complaint for insufficiency, it also granted the plaintiff leave to amend.

In other words, the plaintiff was given the opportunity to insert by amendment the missing allegation as to actual insolvency as of the date of the proclamation.

In the third place, the *Pyne* case was decided several years before the decisions of the Supreme Court of the United States in *Oppenheimer v. Harriman Bank*, 301 U. S. 206, and in *Yonkers v. Downey, Receiver*, 309 U. S. 590, *post*, and before many of the other decisions on the point hereinafter cited.

Indeed, if given the construction claimed by the Appellate Division, the *Pyne* case must be deemed overruled by the aforesaid later decision of the same Federal Court, Southern District of New York (affirmed by the Circuit Court of Appeals for the Second Circuit), in *Bryce v. National City Bank*, 17 Fed. Supp. 792, *aff'd* 93 Fed. (2nd) 300 (C. C. A. 2d).

POINT IV

The decision of this Court in *Yonkers v. Downey, Receiver*, 309 U. S. 590, rehearing denied 310 U. S. 656, is conclusive that the closing on March 3, 1933, under mandate of the Government and continuous thereafter because of serious insolvency, is the date as of which the Bank must be deemed to have failed to meet its obligations, notwithstanding that up to March 13 it did a limited business under the restrictive Treasury Regulations.

That decision affirmed the decision of the Circuit Court of Appeals for the Second Circuit in 106 F. (2d) 69, which in turn affirmed the decision of the trial court in 23 Fed. Supp. 1018.

There the Supreme Court had before it the President's proclamation issued at 1:00 A. M. on March 6, 1933; the fact soon ascertained by the Comptroller that the First National Bank & Trust Company of Yonkers (up till then

a going bank) was actually insolvent at the time of the proclamation; and the further fact that up to the appointment of the conservator on March 20, 1933, the Bank had continued to carry on all the limited business permitted by the restrictive Treasury Regulations. The question was whether March 6 or March 13 was the date of fixation. The Supreme Court expressly affirmed the ruling of the trial court that (p. 594):

“The Bank was insolvent March 6th, 1933, and as of that day the rights of creditors became fixed.”

In the first instance, District Judge KNIGHT had held the same thing in 23 Fed. Supp. 1018; at page 1022:

“The purpose of the appointment of a conservator is to hold matters in status quo pending a receivership or some change which may allow the bank to reopen. Between the official closing of a bank and the appointment of a conservator or receiver, additional liabilities may not be imposed upon the assets of a bank. *Bryce v. National City Bank of New Rochelle*, D. C., 17 Fed. Sup. 792. • • • It follows therefore that the rights of creditors relate back to the date of the closing of the bank pursuant to the President's Proclamation of March 6, 1933. *Goess v. Heckscher*, Opinion by Knox, J. (D. C. S. D. N. Y.); *Hardee v. Washington Loan & Trust Co.*, 67 App. D. C. 241, 91 F. 2d 314; *Mine Safety Appliance Co. v. Dehne*, Feb. 3, 1938; *Bryce v. National City Bank of New Rochelle*, *supra*.”

POINT V

There are many decisions of Federal and State courts holding that where a bank was insolvent as of the date of the Gubernatorial or Presidential Proclamation and in consequence never reopened for regular banking business, that date must be accepted as the official date of closing, fixing the rights of creditors and debtors and terminating the assessment period as regards stockholders.

Many of these cases involved the Harriman Bank itself.

SUBDIVISION I

Cases Involving the Harriman Bank

Take for example *Oppenheimer v. Harriman National Bank & Trust Co.*, 301 U. S. 206, which contains the following extremely pertinent language by this Court (p. 207):

“Being unable to meet current demands, it (the Harriman Bank) closed March 3, 1933.”

And at page 214 the same opinion of this Court says (the italics are ours):

“We assume that after March 3, 1933 the Bank was without means sufficient to meet current demands and that its debts exceeded the value of its assets, *plus the statutory liability of its stockholders.*”

Another example is *Goess v. A. D. H. Holding Corporation*, 85 F. (2d) 72 (C. C. A. 2d) where, concerning this closing of the Harriman Bank the Circuit Court of Appeals said at page 74 (the italics are ours):

“It is settled that a shareholder may not avoid the *statutory liability for assessment* by rescinding after the bank’s ‘failure,’ which we understand to mean insolvency.”

To the same effect, and involving the Harriman Bank, are:

Goess v. Ehret, 85 Fed. (2d) 109 (C. C. A., 2d);
Gimble v. Harriman Bank, 11 Fed. Supp. 836, 839;
 (rev'd on other grounds, 83 Fed. [2d] 153);
Goess v. Heckscher, an unreported decision by
 Judge Knox on December 1, 1934.

SUBDIVISION II

Stock Assessment Cases Involving Banks Other Than the Harriman

In the following cases the stock assessment period was held to terminate with the last date when the bank (actually insolvent) did an unrestricted banking business, even though a conservator or receiver was not appointed, or formal liquidation proceedings did not begin, until later.

State v. Harris, 59 Ohio App. 165, aff'd 135 Ohio St. 449;
Willing v. Jensen, 17 Fed. Supp. 596, 598;
Willing v. Pennsylvania Co., 21 Fed. Supp. 233;
Willing v. Delaplaine, 23 Fed. Supp. 579, 580;
Smith v. Witherow, 102 F. (2d) (C. C. A. 3d) 638, 640.

The theory of these cases, as stated in the first *Willing* case, *supra*, is (p. 598):

"It is thus obvious that the so-called restricted paying basis upon which the bank was admittedly placed after February 28, 1933, was not a paying basis at all so far as concerned the depositors and other creditors whose claims had accrued prior to that date."

And in the *Smith* case, *supra*, the Circuit Court of Appeals had before it a national bank which went on a restricted paying basis on February 18, 1933. In an

action to recover a stock assessment the question was whether or not the statutory sixty-day period ended on that day or ran along until the restricted paying stopped and liquidation began. The Circuit Court of Appeals unanimously held that the sixty-day period ended when the restricted paying basis began. The Court stated (p. 640):

"A national bank is insolvent within the meaning of the National Bank Act, 12 U. S. C. c. 2, 12 U. S. C. A. § 21 et seq. when it is unable to meet its obligations as they mature. *Roberts v. Hill*, C. C., 24 F. 571; *Kullman & Co. v. Woolley*, 5 Cir., 83 F. (2d) 129; *Willing v. Eveloff*, 3 Cir., 94 F. (2d) 344."

There are many other cases which apply the same principle in determining the date as of which the rights of creditors and debtors of an insolvent bank are to be deemed fixed. These cases hold that such date is the date when the insolvent bank's doors closed and never reopened or the date when the insolvent bank went on a restricted paying basis which subsequently evolved into liquidation.

In some of these cases, following the ruling of the Comptroller of the Currency set forth in Point II, *supra*, the courts applied this principle to the restricted paying basis imposed by these very Gubernatorial and Presidential Proclamations during the first week of March, 1933.

Daly Brothers, Inc. v. Hickman, 61 Washington Law Reporter 802, 804 (Supreme Court, D. C.);

Dehne v. Mine Safety Appliance Co., 94 F. (2d) 956, 958 (C. C. A. 3);

Hardee v. Washington Loan & Trust Company, 91 F. (2d) 314, 317 (U. S. Court of Appeals, Dist. of Col.);

In re Battini, 6 Fed. Supp. 376;

J. L. Hudson Co. v. Thomas, 6 Fed. Supp. 857;

Steele v. Randall, 19 F. (2d) 40 (C. C. A. 8).

In the case of *Daly Brothers, Inc. v. Hickman, supra*, the Supreme Court of the District of Columbia said (p. 804):

"It was the purpose of the President's proclamation to preserve the condition of the bank as it was on March 6, 1933, and the appointment of the conservator on March 14, 1933, was merely an administrative act on the part of the Comptroller of Currency to place in charge of the bank a representative of the Treasury Department."

And in the *Hardee* case, *supra*, the United States Court of Appeals for the District of Columbia said (the italics being ours) (p. 317):

"In our opinion the effect of the President's Proclamation of March 6, 1933, was to close all of the banks, including the Federal American Bank, *as for a conservatorship*, and thus fixed the rights of their depositors and other creditors at that time, subject to subsequent licensing."

POINT VI

The interpretation by the State Court of Appeals of the Federal statute and its attempted distinction between the date as of which rights of creditors become fixed and the date of the termination of the sixty day assessment period are, we submit, not justifiable; and, in any event, present a question which should be reviewed by this Court.

(1) On the one hand, the Court of Appeals states that although a conservator was not appointed until March 13, 1933, nevertheless the Comptroller was right in fixing March 3, 1933, as the date when "the right of creditors" became fixed. To quote the opinion (287 N. Y. 510, 516):

"When an insolvent bank was denied permission to reopen for regular business after the end of the

banking holiday, though solvent banks then resumed their usual banking operations, the date when the *right of creditors* attached was properly fixed at the time 'when the facts indicated that the bank would not be able to pay its depositors in due course' though at that time the banking holiday was not completely at an end. (*Downey v. City of Yonkers*, 106 Fed. Rep. (2d) 69; *affd.*, 309 U. S. 590. See, also, *Bryce v. National City Bank of New Rochelle*, 17 Fed. Supp. 792; *affd.*, 93 Fed. Rep. (2d) 300)."

On the other hand, the Court of Appeals held that as to the liability of stockholders, the statutory period terminated with March 13, 1933, because, in the Court's opinion, not until then was there a "failure of such association to meet its obligations". To quote the opinion (p. 517):

"The time when it appears that insolvency makes it impossible for a bank to meet all its obligations as they mature has been chosen by Congress as the appropriate date upon which the rights of creditors against the bank attach; the time when a bank is actually in default in meeting its obligations as they become due has been decreed by Congress as the appropriate date upon which the liability of stockholders of the bank attaches. Often, perhaps usually, the dates will coincide—not always."

This adoption of a different and later date as to when the indebtedness of stockholders became fixed is, we submit, contrary not only to the rules and determination of the Comptroller of the Currency as set forth in Points II and III, *supra*, but contrary to the decisions of this Court and of numerous Federal District Courts and State Courts discussed or cited in Points IV and V, *supra*.

(2) Moreover, the distinction is, we submit, unsound in principle.

The date which freezes the respective rights and duties of the creditors and depositors must, of necessity, also be the date which freezes the rights and duties of the

stockholders and other debtors. It would involve a contradiction of terms to argue that the date which fixed the claims of the creditors did not also fix the liabilities of the debtors.

Creditors are entitled to a ratable distribution as of that freezing date according to the then *deficit*; and the stockholders, as debtors, have the obligation to contribute ratably to the making up of that self-same deficit as it then stood.

Assessment cases *are* insolvency cases; and in insolvency cases the rights of creditors and the liabilities of the stockholders mutually involve the calculation and the fixation of a deficit as of a given date. There cannot be one deficit and date for the creditors and another deficit and date for the debtor stockholders.

It is true that a bank may be insolvent and yet continue for a while to meet current demands. But that is not this case. This is a case where the bank ceased to do a regular banking business and, because of its then insolvency, failed ever to resume a regular banking business and for that reason has been liquidated as of the date when it first ceased to do a regular banking business.

If the bank had subsequently opened as a solvent, going institution, there might have been no occasion for an assessment, but it did not and could not. Hence, it never ceased to fail to meet all its current obligations.

POINT VII

The State Court of Appeals was also in error, we submit, in holding that the federal statute imposed on the "ultimate transferee" "a primary duty to meet the liability," and in holding that an ultimate purchaser who was not even a stockholder of record was liable in law to indemnify a prior holder with whom he had no relationship either of privity or of quasi-trust.

In any event, a question of such general importance should, we believe, be reviewed by this Court.

Even if transfer of the certificates to the defendant be deemed to have taken place within the sixty-day assessment period, the law did not, in our judgment, impose upon him any obligation of indemnity as regards Blumenthal.

The State Court of Appeals in its opinion construed the federal statute, and declared (287 N. Y. 510, 521):

"The statute clearly indicates that Congress intended that the ultimate transferee should be under a primary duty to meet the liability for all other persons who were made subject to the liability only to the extent that such transferee failed to meet it."

We believe this erroneous. The statute creates no liability except to the Comptroller of the Currency. As to those falling within the sixty-day period it expressly declares:

"The stockholders * * * shall be *individually* responsible."

The statute says nothing at all about liability *inter sese*. It places on no one of the stockholders within the sixty-day period a primary obligation not equally resting upon all the others. It sets up no principal creditor or principal debtor and classifies no one as surety.

The Court of Appeals (p. 518) quotes the expression in the statute that the first holder shall be liable only

“to the extent that the subsequent transferee fails to meet such liability.”

This expression emphasizes rather than militates against our point. It merely means that where one of a number of debtors equally liable has paid in whole or in part, no other debtor shall be liable to make such payment a second time. The expression had to do solely with *preserving* liability on the part of a stockholder who had made a transfer within the sixty-day period. It said nothing at all about any liability by the later stockholder to the earlier. If the statute had intended a primary and secondary liability or a principal and surety relationship, it would not have confined its statement as to liability solely to the liability to the Comptroller.

This, we repeat, is a suit solely at law. It was not brought in equity. The only parties to it are Blumenthal's assignee and the defendant. Blumenthal was never under any obligation to the defendant. He never had any duties, equitable or legal, as regards him. There were several intervening transfers of record. Hence, the defendant has never had any obligation to Blumenthal. There never was any privity between them.

The Court of Appeals speaks of “well-established equitable principles” whereby the owner of stock, having the right to receive all the benefits, must also meet all the burdens; but the attempted application of this proposition to the present case strikes us as a clear begging of the question. No judicial decisions in support of such application are cited. All the cases cited in the respondent's brief in the Court of Appeals, when examined factually, show a conventional relationship of principal and surety, a direct privity in obligation, or a quasi-trust relationship whereby the right of one to receive the benefits from another creates a correlative obligation to relieve the latter of the burdens. The defendant never had any right to receive any benefits from Blumenthal.

There are two theories upon which a purchaser of stock is at times held liable to indemnify a record owner for payment of an assessment:

(a) The implied contract theory.

(b) The quasi-trust theory.

Neither can be applied in this action at law.

The implied contract theory is the so-called English rule. The English courts imply a promise by a vendee to indemnify his immediate vendor against any loss which the latter may incur at any time because of his status as record owner. Hence it is immaterial whether or not such vendee is still the real owner of the stock.

Spencer v. Ashworth, Partington & Co., 1925, 1 K. B. 589;

Kellock v. Enthoven, L. R. 9 Q. B. 241.

The quasi-trust theory rests not on a past vendor-vendee relationship, but upon a present, existing trust relationship.

This is the theory heretofore followed in the State of New York.

As said by the Court of Appeals in *Broderick v. Aaron (Rice)*, *supra* (264 N. Y. 368, 378):

"In so far as the law implies correlative obligations solely from the *quasi-trust* relationship, they depend upon privity of estate and cease when that privity terminates. That is true alike where the *cestui* is the original buyer and where the *cestui* is a subsequent assignee."

Again the Court of Appeals said (p. 377):

"No cases have been cited to us from any American jurisdiction where the obligation to indemnify a seller of stock has been extended beyond the time when the *quasi-trust* relationship between buyer and seller ceased."

And the Court further said (p. 377):

“Seller and buyer occupy a *quasi*-trust relationship as long as the seller remains the holder of record and the buyer remains the actual owner of the stock.”

This *quasi* trust theory of correlative rights and duties has been of long standing and well founded in the law of the State of New York.

Johnson v. Underhill, 52 N. Y. 203, 210-11;
Currie v. White, 45 N. Y. 822;
Gaffney v. People's Trust Co., 191 App. Div. 697,
 affirmed 231 N. Y. 577;
Richards v. Robin, 175 App. Div. (1st Dep't) 296,
 aff'd without opinion, 225 N. Y. 719;
Broderick v. Alexander (Kahn), 268 N. Y. 306,
 309.

In the case at bar there was and is, as between Blumenthal and Rosenbaum, a complete absence of any trust relationship of record holder to beneficial owner—indeed of any relationship at all.

There is no prior judicial decision in New York or any other jurisdiction holding that a purchaser of bank stock is bound, in connection with a stock assessment by governmental mandate, to indemnify holders of record who were such prior to the record ownership which existed at the time of his purchase. Nor does the federal statute declare any such obligation.

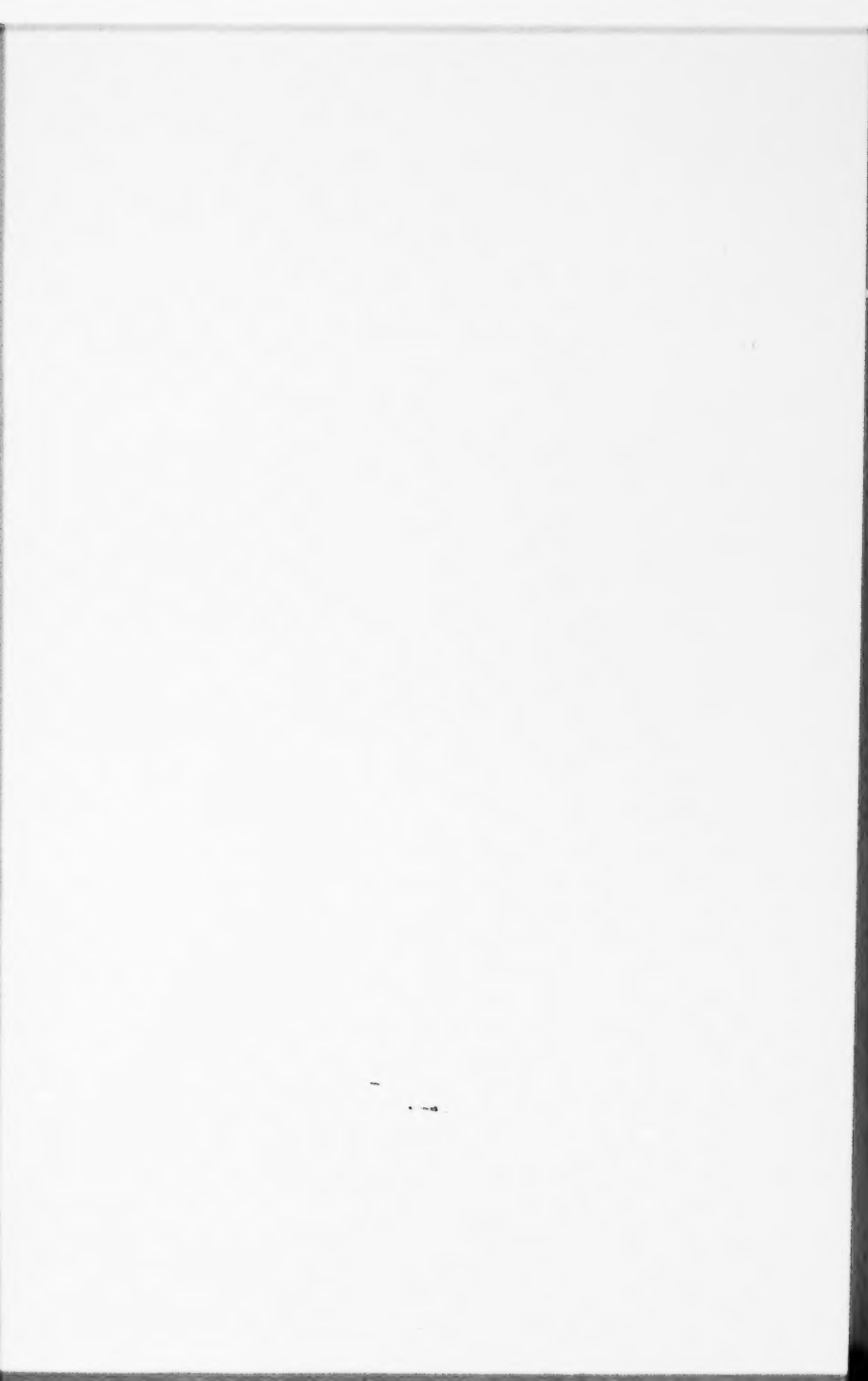
CONCLUSION

The petition for a writ of certiorari should be granted.

Dated April 24, 1942.

CHARLES H. TUTTLE,
 Counsel for Petitioner,
 15 Broad Street,
 New York, N. Y.





APPENDIX A**Opinion of the Court of Appeals of the State of
New York**

(287 N. Y. 510)

**FREDERICK BROWN, Respondent, v. LOUIS N. ROSENBAUM,
Appellant.**

(Decided March 5, 1942.)

APPEAL from a judgment, entered July 9, 1941, upon an order of the Appellate Division of the Supreme Court in the first judicial department which (1) reversed, on the law, a judgment in favor of the defendant entered upon a dismissal of the complaint on the merits by the court at a Trial Term (EDER, J.), a jury having been waived, and (2) directed judgment in favor of the plaintiff.

CHARLES H. TUTTLE for appellant.

ALFRED A. COOK, KENNETH E. WALSER and HENRY COHEN for respondent.

LEHMAN, Ch. J. Plaintiff's assignor, George Blumenthal, paid a judgment for the sum of \$10,263.28 recovered against him as owner of 92 shares of stock of the Harriman National Bank and Trust Company of the city of New York, in an action brought by the receiver of the bank to enforce the liability imposed by Federal statute (U. S. Code, tit. 12, § 64) upon the stockholders of an insolvent national banking association. Blumenthal had transferred shares in the bank within sixty days prior to Monday, March 13, 1933, when a conservator was appointed for the bank. The buyers had in turn transferred the same shares before that date. Blumenthal's liability under the provisions of the statute is clear beyond dispute. Claiming that at the time the bank failed to meet its obligations the

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defendant was the owner of the shares of stock which Blumenthal had transferred within sixty days before that time, the plaintiff, as Blumenthal's assignee, brought an action to compel the defendant to repay the amount which Blumenthal, as the prior owner of the shares, had been compelled to pay. He has recovered a judgment against the defendant for the par value of eighty-six shares of such stock with interest. The defendant has appealed from that judgment.

The statute which imposes liability upon stockholders of national banking associations provides.

“Individual liability of shareholders; transfer of shares.

“The stockholders of every national banking associa-

tion shall be held individually responsible for all contracts, debts and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure. (Dec. 23, 1913, c. 6, § 23, 38 Stat. 273.)” (U. S. Code, tit. 12, § 64.)

The defendant on Monday, *March 6*, 1933, agreed to purchase ninety-two shares of stock in the bank. No bank in the State of New York was open for business on that date for the Governor of the State shortly before midnight on March third, had by proclamation “set apart Saturday,

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March 4th, and Monday, March 6th as holidays on which all banking institutions will be closed." By subsequent proclamation of the President and the Governor all banks remained closed and were prohibited from carrying on their banking business, except as authorized by the Secretary of the Treasury, until March 13th. Then banks which were solvent were permitted to resume business in accordance with regulations of the Secretary of the Treasury. The Harriman National Bank and Trust Company was, it is conceded, insolvent "by a large sum" on March 3d when, like all other banks in New York, it was compelled to close by proclamation of the Governor. Until that time it had carried on its usual banking business and had not failed to meet its obligations. When solvent banks were thereafter permitted to reopen a conservator was appointed for the Harriman National Bank and it was forbidden to pay its depositors. When its hopeless insolvency was revealed, its business was liquidated.

The judgment against the defendant is based upon a finding of fact that on *March 11, 1933*, while all banks remained closed in accordance with the proclamations of the President and Governor, eighty-six shares of stock, identified as shares which plaintiff's assignor had transferred a few weeks earlier, were delivered to the agent of the defendant upon the contract of purchase and sale made in behalf of the defendant on March 6th. The defendant challenges that finding. It is fully supported by the evidence. Two questions of law remain, which must be decided upon this appeal: *First*. Was the date of the bank's failure "to meet its obligations," at which time the statutory liability of stockholders attached, March 3, 1933, before the defendant purchased his stock, or March 13th, after the stock was delivered to defendant? *Second*. May a stockholder who has transferred his stock within sixty days before the date of the failure of the bank to meet its

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obligations and who, for that reason, has been compelled to pay a judgment recovered against him in an action brought to enforce the statutory liability imposed on stockholders of banking associations, maintain an action for reimbursement against the stockholder who had become the owner of the stock at the date of such failure through delivery from persons to whom it had been previously transferred?

It is clear that a bank has not failed to meet its obligations within the meaning of the statute so long as it pays its obligations at the time and place its obligations are payable. While all banks remained closed by command of the government, the date when payment of the obligations of each and all banks became due and could be demanded was postponed. Certainly no solvent bank which resumed business and paid its obligations when permitted by the government was in default in any payment for which it would have been liable in the interval if the date for payment had not been postponed. The appellant, of course, does not claim otherwise. His claim is that where a bank was insolvent at the time it was closed by governmental authority and for that reason was not thereafter permitted to reopen, the date on which it was compelled to close under proclamation of the President or of the Governor fixes the time when rights of creditors and the responsibility of stockholders for the debts of the bank became fixed.

Under the National Banking Act the rights of creditors against a national bank attach when an "act of insolvency" is committed. (U. S. Code, tit. 12, § 91.) The directors have no power after that date to change or defeat such rights by preferential payments or other devices. Under ordinary circumstances the date of insolvency is fixed when the assets of a bank are surrendered by its directors to the Comptroller for administration or when the Comptroller

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exercises administrative authority to conserve or liquidate bank assets. During the banking holiday when *all* banks were closed by governmental authority and payment of any banking obligations was prohibited, there was no occasion for the Comptroller to take possession of the assets of an insolvent banking association in order to conserve them or to prohibit the insolvent banking association from continuing to conduct its banking business. When an insolvent bank was denied permission to reopen for regular business after the end of the banking holiday, though solvent banks then resumed their usual banking operations, the date when the *rights of creditors* attached was properly fixed at the time "when the facts indicated that the bank would not be able to pay its depositors in due course" though at that time the banking holiday was not completely at an end. (*Downey v. City of Yonkers*, 106 Fed. Rep. [2d] 69, 74; *affd.*, 309 U. S. 590. See, also, *Bryce v. National City Bank*, 17 Fed. Supp. 792; *affd.*, 93 Fed. Rep. [2d] 300.)

Congress has not, however, provided that the *liability* of stockholders like the rights of creditors against an insolvent bank, attaches at the date of an "act of insolvency." Congress has expressly provided that liability of stockholders of an insolvent banking association attaches and becomes fixed upon "the date of the failure of such association to meet its obligations." The time when it appears that insolvency makes it impossible for a bank to meet all its obligations as they mature has been chosen by Congress as the appropriate date upon which the rights of creditors against the bank attach; the time when a bank is actually in default in meeting its obligations as they become due has been decreed by Congress as the appropriate date upon which the liability of stockholders of the bank attaches. Often, perhaps usually, the dates will coincide—not always.

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Where, while other banks remain open, a bank is closed or is placed upon a restricted basis or is prohibited or prevented from paying its debts as they become due *in order to conserve its assets* pending determination whether it is insolvent or whether its capital has been impaired and if impaired whether the impairment can be corrected, there is a "failure" of the bank "to meet its obligations." In such case the closing of the bank may determine both the date when the rights of creditors and the liability of stockholders attach. That is true even though at that time it is hoped that the closing may be only temporary. (See *Broderick v. Aaron [Kornberg]*, 268 N. Y. 260; *State ex rel. Squire v. Harris*, 59 Ohio App. 165; *affd.*, 135 Ohio St. 449; *Willing v. Jensen*, 17 Fed. Supp. 596; *Willing v. Pennsylvania Co.*, 21 Fed. Supp. 233.) When, however, by proclamation of the President and Governor, made pursuant to authority vested in them, the date upon which banking obligations became due and may be paid is postponed, there is, as we have already pointed out, no "failure" by any bank "to meet its obligations." That is the case here. The date of such failure arrives only when a bank fails to open or refuses to meet its obligations which then have matured though other banks are open and carrying on their business without restriction. The Comptroller of the Currency is not charged with responsibility to fix that date. It is fixed according to statute by an act of default, not by an act of insolvency, and the courts must determine when such an act has occurred. Here, it is shown, as matter of law, the act of default occurred on March 13, 1933, and that date cannot be altered by any administrative ruling.

Though on that date the defendant was the owner of eighty-six shares of stock in the bank and subject to the statutory liability imposed upon stockholders to the amount of the par value of the stock each owned, the payment by

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the plaintiff's assignor of the assessment levied upon the stock owned by the defendant satisfied the defendant's statutory liability and relieved him of further payment upon it. The plaintiff's assignor, having transferred the same stock within sixty days of the date when the statutory liability of stockholders attached, remained subject to a stockholder's statutory liability as if he had made no transfer but only "to the extent that the subsequent transferee fails to meet such liability." When the statutory liability of "the subsequent transferee" is extinguished by the payment made by the stockholder who had transferred his stock, no right of action for the failure of the transferee to meet such liability is created *by the statute* in favor of the stockholder who made the transfer. Recourse, if any, against the transferee must be by common law action. Here the plaintiff asserts a right of action based on a contract implied in law for moneys which his assignor was compelled to pay though it was the duty primarily of the defendant to make the payment.

The general rule which must be applied where such a right of action is asserted has been firmly established by an almost unbroken line of judicial decisions and by academic authority. "A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, * * *." (American Law Institute, Restatement of the Law of Restitution, § 76.) Where payment by one person is compelled, which another should have made or which redounds solely to the benefit of another, a contract to reimburse or indemnify is implied by law. The defendant does not seriously dispute the rule but he maintains that the obligation to pay was imposed upon both the plaintiff and the defendant, and that no privity of contract or estate existed between them, and that the defendant was under no greater duty to pay and derived no greater benefit from the payment than the plaintiff.

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This court has in many cases been called upon to define rights and liabilities arising under analogous provisions of the statute in this State which formerly imposed a similar liability upon stockholders of banks organized under the law of New York. (Banking Law [Cons. Laws, ch. 2], §§ 80 and 120 [113-a], now partially repealed and re-numbered by L. 1938, ch. 684.) In the statute "stockholders" upon whom liability for the debts of an insolvent bank was imposed were defined as "(1) such persons as appear by the books of the bank to be stockholders (2) every owner of stock, legal or equitable, although the same may be on such books in the name of another person * * *." Under that definition only a stockholder of record and the legal or equitable owner of stock standing in the name of another *at the time when the stockholder's liability attached* were subject to the statutory liability. The record owner may have sold and transferred his stock; the buyer may have in turn sold his stock to another; "the record holder may not even know that the buyer has transferred the stock to another. None the less the law makes the holder of the record title to stock a *quasi* trustee for the actual owner and the law implies * * * an obligation on the part of the actual owner to indemnify the record holder against liabilities." Thus, whenever under the New York statute a record holder who had parted with legal and beneficial ownership was compelled to pay the assessment, he was a *quasi* trustee for the actual owner and had a right of action under a contract implied by law to compel the actual owner to indemnify him. (*Broderick v. Aaron [Rice]*, 264 N. Y. 368, 378.)

In that case the record owner sought, however, to hold not the actual owner who also was subject to the statutory liability, but the person to whom the record owner had sold his stock and who in turn had sold it to the person who was the actual owner when the statutory liability attached.

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The person sought to be charged with the obligation to indemnify the record owner was under no statutory liability and gained no benefit from the payment by the record owner to meet a duty which the record owner owed to the state. In deciding that in such circumstances the law did not imply a contract by the intermediate buyer to reimburse the seller of the stock since the obligation to indemnify arises only where one person has discharged a duty which is owed by him, but which as between himself and another should have been discharged by the other, we pointed out "no cases have been cited to us from any American jurisdiction where the obligation to indemnify a seller of stock has been extended beyond the time when the *quasi* trust relation between *seller and buyer* ceased;" and again that it is "difficult then to find any sound basis for the implication of an obligation *by the buyer to indemnify the seller* which continues after the buyer has terminated the *quasi* trust relationship between himself and the seller" (pp. 377, 378). (Italics are new.)

The defendant upon this appeal leans heavily upon what we said and decided in that case, but here the plaintiff does not assert that a *buyer* is under an obligation to indemnify the seller after the buyer has terminated the *quasi* trust relationship between himself and the seller. Unlike the New York statute the federal statute imposes liability for the same obligation upon persons between whom there may be neither privity of contract nor privity of estate, and here the plaintiff asserts that *as between these persons* the beneficial owner of the stock at the date when liability attached should have discharged the obligation. Nothing said or decided in the case of *Broderick v. Aaron (Rice)* (*supra*) can lead to the conclusion that as between the persons who were subject to the same liability the primary duty to discharge it does not rest upon the beneficial owner. The statute clearly indicates

Appendix

that Congress intended that the ultimate transferee should be under a primary duty to meet the liability for all other persons were made subject to the liability only to the extent that such transferee failed to meet it. More important, however, is the fact, as we pointed out in the *Broderick* case, that upon well-established equitable principles beneficial ownership of stock gives rise not only to the right to receive all the benefits of ownership, but also the obligation to meet all the burdens of ownership.

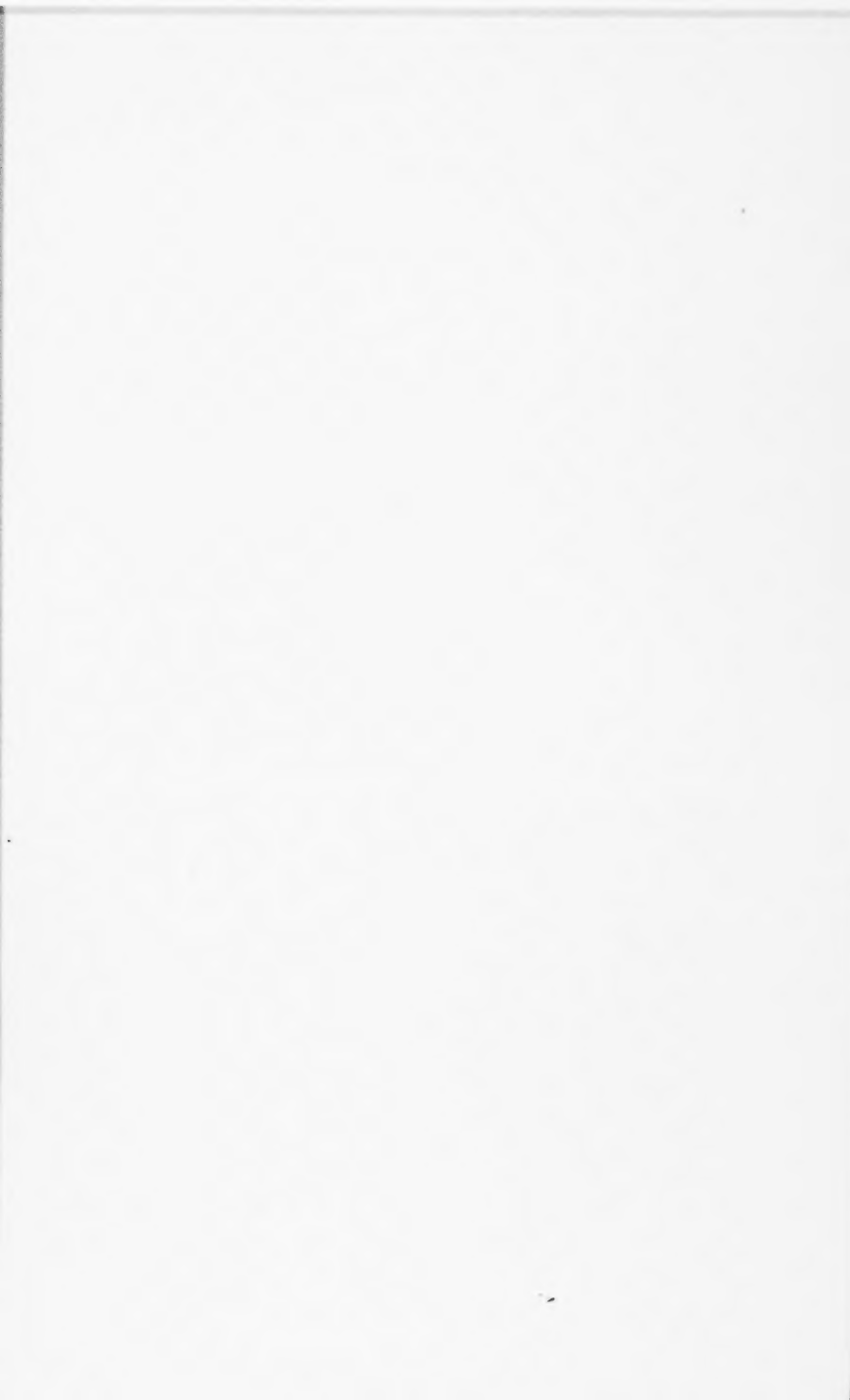
Analysis in this opinion of other objections urged by the appellant and rejected by the court would serve no useful purpose.

The judgment should be affirmed, with costs.

LOUGHRAN, FINCH, RIPPEY, LEWIS, CONWAY and DESMOND, JJ., concur.

Judgment affirmed.





(26)

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CHARLES ELMORE GROPLE

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1941

—
No. 1182
—

LOUIS N. ROSENBAUM,

Petitioner,

against

FREDERICK BROWN,

Respondent.

—
**BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**
—

ALFRED A. COOK,
KENNETH E. WALSER,
HENRY COHEN,

Counsel for Respondent.



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IN THE
Supreme Court of the United States
OCTOBER TERM 1941

No. 1182

LOUIS N. ROSENBAUM, Petitioner, AGAINST FREDERICK BROWN, Respondent.
--

BRIEF FOR RESPONDENT

This Court will not find quoted in the petitioner's argument (pp. 8-24) the words of the statute which petitioner urges was improperly interpreted in the courts below (12 U. S. C. sec. 64). The omission is significant, for the exact language of the statute refutes petitioner's claims.

The statute, section 64, imposes liability for assessment upon any stockholder of a national bank within sixty days before its "failure * * * to meet its obligations". Chief Judge Lehman has held for a unanimous Court of Appeals of New York that the "failure" of the Harriman National Bank "to meet its obligations" occurred at the end of the banking holiday on March 13, 1933,—some days after petitioner bought his shares. March 13 was the day on which the banks of New York resumed business but the Harriman Bank was not permitted to open. It then follows upon

elementary common law principles involving no federal question that petitioner should reimburse respondent's assignor, who was required to pay the assessment upon the shares although petitioner was the owner of the shares when the bank failed.

Petitioner asserts (p. 7) that interpretation of section 64 is of general importance in view of the number of bank failures in 1933, and in "the future administration" of the statute. But (putting aside the settled interpretation of section 64 in its application to the banking holiday of March 1933—see pp. 7-9, *infra*) nearly a decade has passed since the banking holiday; and need for administration of the law cannot arise in the future unless, notwithstanding legislation now existing, we can conceive of another national banking moratorium.

The Facts

Blumenthal, the respondent's assignor, was the owner of record of shares of Harriman National Bank stock within 60 days before its failure (fol. 177). On March 6, 1933, during the national banking holiday, the petitioner, Rosenbaum, bought some of them from an intermediate owner (fols. 134-155; 691 *et seq.*, 136 *et seq.*, exh. 29, fol. 1219), and the shares with respect to which he has been held liable in the present action were delivered to him during the holiday.

The Governor of the State of New York had proclaimed a holiday for all the banks of the State on March 3, 1933 (fol. 1057). Until that day, the Harriman Bank had done a general banking business without any restrictions whatever (fol. 160). Indeed, during the holiday, the Harriman Bank paid out, under Treasury regulations (fols. 1084-1116; 1129-1144) against funds on deposit with it, for the payrolls of its customers and other emergencies of its depositors, approximately a half million dollars (fols. 163-5, 194). Thus petitioner's implication (petition, p. 9) that

the Bank closed on March 3 for "hopeless insolvency" is without basis in the facts.

There was even no suspicion that the bank would not open upon termination of the holiday (fols. 785-8, 844, 849). The Harriman Bank was one of the banks of the New York Clearing House Association (fol. 845). It does not appear that its own officers had any inkling that it would not open (fols. 165-6, 791, 171-2). Neither did the public—or the petitioner would not have purchased his shares (exhs. 3, 3-A, 3-B, pp. 337-9; cf. fols. 852-3).

When the holiday ended on March 13 (fol. 163), the other banks in New York City were permitted by the Treasury Department to open. Only at that time, as the result of an examination of its assets and following repudiation of a pledge to support it which had been made by the New York Clearing House Association (see *O'Connor v. Bankers Trust Co., et al.*, 159 Misc. 920, at 925-8, aff'd. 253 App. Div. 714, aff'd. 278 N. Y. 649), was the Harriman Bank denied such permission. Only then was a Conservator appointed for it (fols. 92, 165-6, 178, 1018).

Petitioner states (p. 4) that the Comptroller of the Currency levied his assessment only upon those persons who were shareholders within 60 days of March 3, but this is not the fact. Neither the Comptroller (nor the "Treasury Department"—brief for pet. pp. 11, 14) ever limited the assessment to stockholders on or before March 3 (see fol. 1030). In fact the Receiver of the bank sent notices of assessment both to petitioner and to respondent's assignor (fols. 93, 1036-1050).

History of the Litigation

The first trial of the action resulted in a judgment for the respondent requiring petitioner to reimburse him for the assessment paid by the respondent's assignor (opinion of Mr. Justice Steuer, *New York Law Journal*, October 17, 1939). But because of a misunderstanding of counsel con-

cerning their stipulation of the facts, the Appellate Division of the State of New York reversed the judgment and ordered a new trial (259 App. Div. 304). The petitioner had a judgment at the second trial which, however, the Appellate Division reversed—four judges concurring and one dissenting (262 App. Div. 136). The New York Court of Appeals unanimously affirmed the ensuing judgment in favor of the respondent (287 N. Y. 510).

Questions Involved

The opinion of Chief Judge Lehman of the Court of Appeals succinctly sets forth the questions involved—in their exact relation to the language of the statute (p. 461):

“Two questions of law remain, which must be decided upon this appeal:

First: Was the date of the bank's failure ‘to meet its obligations’, at which time the statutory liability of stockholders attached, March 3, 1933, before the defendant purchased his stock, or March 13, after the stock was delivered to defendant?

Second: May a stockholder who has transferred his stock within sixty days before the date of the failure of the bank to meet its obligations and who, for that reason, has been compelled to pay a judgment recovered against him in an action brought to enforce the statutory liability imposed on stockholders of banking associations, maintain an action for reimbursement against the stockholder who had become the owner of the stock at the date of such failure through delivery from persons to whom it had been previously transferred?”

As to the first question, the opinion points out (pp. 461-2) that the statute fixes the liability of the stockholders of a national bank as of “the date of the failure of such association to meet its obligations”, and not any other date when the bank was or might have been insolvent and which

time the rights of creditors became fixed. And the opinion holds that failure of the Harriman Bank to meet its obligations first occurred at the end of the banking holiday when the other banks opened for business and a Conservator was appointed for the Harriman Bank (see pp. 6-7, *infra*).

The second question does not even appear to present any issue for this Court. As indeed the petitioner points out (br. pp. 25-6)—section 64 does not purport to fix who, of the many persons possibly subject to assessment, should be primarily liable, or to dictate whether the petitioner, the owner of the shares at the failure of the bank, should reimburse the respondent's assignor. The answer depends upon common law principles and not upon section 64. So Chief Judge Lehman pointed out (pp. 463-4):

“When the statutory liability of ‘subsequent transferee’ is extinguished by the payment made by the stockholder who had transferred his stock, no right of action for the failure of the transferee to meet such liability is created *by the statute* in favor of the stockholder who made the transfer. Recourse, if any, against the transferee must be by common law action. Here the plaintiff asserts a right of action based on a contract implied in law for moneys which his assignor was compelled to pay though it was the duty primarily of the defendant to make the payment” (emphasis in original).

POINT I.

The “Failure” of the Harriman Bank “to Meet its Obligations” occurred on March 13, 1933, when a Conservator was appointed.

Under Section 64 only the date of the “failure” of the bank “to meet its obligations” is determinative of petitioner’s liability to assessment. This is the complete answer to petitioner’s contention that the insolvency of the Harri-

man Bank at the beginning of the bank holiday on March 3 constitutes its "failure". The opinions in the present case have made this clear. The Appellate Division stated (p. 453):

"The language of the statute fixes the end of the period as being '*the date of the failure of such association to meet its obligations*'. The Bank never failed to meet any of its obligations until the appointment of a conservator on March 13th. During the period of the bank holiday, it functioned within the restrictions imposed by the Treasury Department, it met all the obligations which it was permitted to meet and its status was no different from any other national bank which later reopened under federal license. * * * The language of the proclamations creating the bank holiday negatives the idea that the closing of the banks was caused by their failure to meet their obligations. The reason assigned in the proclamations was the unprecedented withdrawal of money from the banks and subsequent speculation in foreign exchange, as well as hoarding." (Emphasis in original.)

And in the Court of Appeals (pp. 462-3):

"Congress has expressly provided that liability of stockholders of an insolvent banking association attaches and becomes fixed upon '*the date of the failure of such association to meet its obligations*'. The time when it appears that insolvency makes it impossible for a bank to meet all its obligations as they mature has been chosen by Congress as the appropriate date upon which the rights of creditors against the bank attach; the time when a bank is actually in default in meeting its obligations as they become due has been decreed by Congress as the appropriate date upon which the liability of stockholders of the bank attaches. Often, perhaps usually, the dates will coincide—not always.

.

When, however, by proclamation of the President and Governor, made pursuant to authority vested in them, the date upon which banking obligations became

due and may be paid is postponed, there is, as we have already pointed out, no 'failure' by any bank 'to meet its obligations.' That is the case here. The date of such failure arrives only when a bank fails to open or refuses to meet its obligations which then have matured though other banks are open and carrying on their business without restriction."

The Authorities

The authorities are unanimous. The leading case is *Pyne v. Jackman*, 12 Fed. Supp. 653 (1934)—the first rendered after the end of the Banking Holiday. The defendant had sold his shares in the Pelham National Bank within sixty days before the beginning of the holiday in New York but more than sixty days before the conclusion of the holiday. It was held that he was not liable for the assessment. The opinion (Goddard, J.) rejects petitioner's argument that March 3 is the determinative date (p. 655):

"It does not seem to me that March 4 can be assumed as the date when the bank failed 'to meet its obligations' as contemplated by Section 64 of the statute. It was closed then by a general proclamation closing all banks; not because it had failed to meet its obligations. The fact is that right up to the time the * * * Bank, as well as all other banks, were closed by the President's proclamation, it was meeting its obligations. * * *

"I think it could hardly be suggested that when the banks throughout the country closed on March 4 pursuant to the general proclamations, that there was such failure to meet their obligations as to hold the stockholders of the national banks liable under section 64 on the ground that the banks had failed to meet their respective obligations."

Petitioner does not fairly state this case (br. pp. 16-17). Plaintiff there was not given leave to plead over merely in order that he might allege the insolvency of the bank. On the contrary, Judge Goddard explicitly held that

whether or not the bank was insolvent when the holiday began was irrelevant.* No amended complaint was ever served, and although the plaintiff there took an appeal from the judgment dismissing the complaint, he later withdrew it.

There are other expressions of the same views:

Schram v. Clair, 28 Fed. Supp. 422 (1939): Judge Gals-ton—"such closings of the bank under the holiday proclamations do not fix the date of the failure of the bank to meet its obligations" (p. 424).

Goess v. Hoit (an unreported opinion in the Southern District of New York in June 1938): Judge Clancy—

"it is difficult to see how the closing of the (Harriman) bank on March 4, could establish the date for determining the sixty day period for liability of shareholders under section 64".

Ward v. Simon, 23 Fed. Supp. 117 (1938): Judge Dickinson found as a fact that the date of the failure of a bank exactly in the position of the Harriman Bank was March 14 (cf. also, *Munro v. Post*, 23 Fed. Supp. 308—E. D. N. Y. 1938).

Sadlier v. Lay, 222 Wis. 641, 643-4 (1936):

"The mere declaration of a bank holiday by the President of the United States in response to a national emergency could not be taken as the date 'of the failure of such association to meet its obligations.' The proclamation applied to all banks and prohibited not

* "There is a genuine difference between the 'date of insolvency' and 'date of the failure of such association to meet its obligations', which is the wording of section 64 * * *. The Congress in the National Banking Act has clearly indicated in sections 91, 161, 191 and 481, title 12 U. S. C. A. that it recognizes the distinction between the insolvency of a bank and failure to meet its obligations, and that they are quite different things. * * * many banks which have not failed to meet their obligations were temporarily insolvent" (12 Fed. Supp., at pp. 655-6).

merely the payment but the presenting of claims, and was open to no inference applicable to a particular bank that that bank was unable to meet its obligations. Solvent or insolvent, it was prohibited from meeting its obligations. * * * The bank in question never secured such a license and, as heretofore stated, a conservator was appointed for it * * * and the time of appointment fixes the 'date' for the purpose of the sixty day statute."

Goess v. Myers, 134 Pa. Super. 272, 4 Atl. (2) 184, 1939 (a suit upon an assessment on shares of the Harriman Bank):

"These cases are ample authority to justify the conclusion that on March 13, 1933, the day the Comptroller concluded the bank was unable to carry on its ordinary business and appointed a conservator there was a failure on the part of the bank to meet its obligations, within the provisions of the statute". (p. 276).

The Nature of the Banking Holiday

Petitioner would imply that the Harriman Bank failed when the holiday began. But since normal banking activity of all banks was suspended on that day, no inference as to the inability of any bank to carry on its normal business could fairly be or have been drawn. Equally would the closing of a bank on Christmas day, or for the full weekend during the summer months, imply its failure. In fact during the holiday the bank met all demands which could legally be made upon it (pp. 2-3, *supra*).

The Comptroller did not, when the holiday began, in fact or in theory take the Harriman Bank or any bank "in charge through an examiner" (br. for pet., pp. 9, 11). There was a holiday, and not a taking over of the assets of the Banks of the country. The reason for the banking holiday was, as expressly stated in the proclamation, "the unprecedented withdrawal of money from the banks and subsequent speculation in foreign exchange, as well as

hoarding" (fols. 1371, 1060-1). It is not the fact, as petitioner asserts (p. 10), that any "continuous conservation of assets was intended".

Only if one assumes that every national bank in the country failed to meet its obligations on March 3, the inception of the holiday, could that day be considered as the date when the 60-day period ended. Even defendant avoids suggesting such a consequence (p. 461). But the Harriman bank functioned precisely as all banks did during the holiday. The distinguishing circumstance did not occur until the bank failed to open its doors when the holiday terminated. Only then was there any "failure" on its part "to meet its obligations".

Petitioner's Contentions

1. *Petitioner's Point II, p. 11.* Petitioner's contention that the "Treasury Department" fixed upon March 3 as the date terminating the 60-day period is based solely on the fact that the receiver of the Harriman Bank first sent notices of assessment to persons who were stockholders of record within the 60-day period before that day. But the receiver also attempted to collect the assessment from the petitioner, who was not a stockholder until after March 3, and, indeed sued him and demanded summary judgment against him. The simple truth is that the Comptroller merely assessed the "shareholders" of the Bank without fixing a date (fol. 1033)—and defendant's argument is merely based on an initial informal ruling of the receiver designed to permit claims against a larger list, which ruling the receiver later modified with equal informality.

Petitioner's pretense (pp. 29-30) that here was a ruling either by the Treasury or the Comptroller should deceive no one.

2. *Petitioner's Point III, p. 14.* Petitioner's reliance upon the Comptroller's ruling as to the date of *insolvency*,

contained in the Circular CR-7 (fols. 1262, 1264), rests upon a misconception which the opinions in this case have sought to dispel. The ruling does not even purport to apply to stockholders (trial court, at fol. 1307; Appellate Division, at fol. 1374). As Judge Goddard stated in *Pyne v. Jackman* (*supra*, p. 7):

"I do not think this could or was intended to be a judicial determination of or to affect the legal status of a stockholder under Section 64, but was intended as merely the date as of which the rights of the depositors of such a bank were to be adjusted" (12 Fed. Supp. at p. 656).

Nor could this ruling effectively fix the rights of stockholders, assuming that it intended to do so. The question as to who are the persons subject to assessment is a judicial question, and not within the class of administrative matters entrusted to the Comptroller. He "did not and could not fix a date different from that fixed by the statute" (fols. 1374-5).

The authorities to which petitioner points (br. p. 13) hold that the Comptroller has discretion to determine whether a banking association should be closed upon allegation of insolvency. Plainly that is an administrative matter and quite different. The opinion of Chief Judge Lehman on this point, page 463, is conclusive.

3. *Petitioner's Point IV*, p. 17: *Yonkers v. Downey*, 309 U. S. 590. Petitioner's insistence upon this authority fully illustrates his fundamental confusion. This court was concerned in that case with the single question whether a transfer made during the banking holiday of assets of a national bank was a preferential transfer under the National Banking Act, sec. 91. In view of the language of section 91, there was only one question: was the bank *insolvent* when the transfer was made? The liability of the stockholders under section 64 of the National Banking Act,

turning upon the date of the "failure" of the institution "to meet its obligations", was not before the Court. The very quotation from the opinion in the District Court to which petitioner calls attention (br., p. 18) emphasizes that only the issue of creditors' rights was involved.

4. *Petitioner's Point V, p. 19.* Petitioner's other authorities fall into three groups.

(a) The "cases involving the Harriman Bank" (p. 19) do not appear to have any bearing on the date of its failure to meet its obligations. The statement in *Oppenheimer v. Harriman National Bank & Trust Co.*, 301 U. S. 206, 207 (br., p. 19), that on March 3 the bank was "unable to meet current demands" was of course inadvertent, as counsel must appreciate. The entire present record contradicts it—the Harriman Bank closed because of the holiday and for no other reason (pp. 2-3, *supra*).

(b) The "stock assessment cases", cited at p. 20 of petitioner's brief, do not present the facts of the present case. In each of the decisions the bank involved had been on a "restricted" basis *before the holiday began*. Of course such a bank "failed to meet its obligations" at the very moment when those restrictions were imposed, and an assessment was properly levied as of that time. But that was not the situation of the Harriman Bank, which did its normal business up to the holiday.

The opinion in the Court of Appeals takes note of these authorities and fully disposes of them (p. 463).

(c) The "many other cases" (brief, pp. 21-2) claimed to establish the date when the banking holiday began as determinative of the 60-day period, are without exception decided under Banking Law section 91, which forbids all preferential transfers after insolvency (and not "failure * * * to meet its obligations"). They hold that a bank which did not open after the holiday must be deemed to have been insolvent at the beginning of the holiday. In this way they

invalidate transfers made during the holiday of the assets of any bank which did not open after the holiday. They do not touch upon any issues involving the liability of stockholders in national banks.

Petitioner's Point VI, p. 22. Petitioner concludes with the contention that "assessment cases *are* insolvency cases" (p. 24)—that is, that the courts below should have identified the date of insolvency (affecting the rights of creditors only) with the date of "failure * * * to meet its obligations" (affecting the liabilities of stockholders). There is neither basis for this claim nor any authority. It does not square with the language of the statute or with its purpose, but rests upon wilful confusion.

POINT II.

The primary Obligation to Meet the Assessment was properly Placed as a matter of General Law upon the Petitioner.

The simple principle applied in placing the ultimate liability for the assessment upon the petitioner was that, since the petitioner was the owner of the shares when the bank failed and so was entitled to any of the benefits accruing upon the shares, he rather than any previous owner should in all fairness also bear their burdens.

The underlying general principle, obvious enough, is laid down in the Restatement of the Law of Restitution (sec. 76) and in a great many other authorities (e. g., *Leake on Contracts*, p. 41; *Commercial National Bank v. Sloman*, 121 App. Div. 874, at 877; *Maule v. Garrett*, L. R. 7 Exch. 101, per Willes, J.). It has been specifically relied upon where the primary liability for an assessment upon bank shares has been in question (see *Brinkley, Exr. v. Hambleton & Co.*, 67 Md. 169, at 178-9); further, the view has several times been expressed that under section 64 the

primary liability rests upon the owner of the shares at the time of the bank's failure (*Laurent v. Anderson*, 70 F. (2d) 819 at 823 (C. C. A. 6); *Ward v. Simon*, 23 Fed. Supp. 117 at 119; cf. *Way v. Mooers*, 135 Minn. 339, *Poston v. Hull*, 75 Oh. St. 502 at 507—see record herein, p. 456).

Indeed this Court stated in this connection in *Early v. Richardson*, 280 U. S. 496 at 498 that

“it would be in disregard of all equitable principles to continue against a seller the burdens of ownership after the purchaser had become entitled to all the benefits including the receipt of dividends”.

It also seems clear that the issue presents no federal question. Whether or not petitioner was equitably bound, in the absence of contract or privity of estate, to make reimbursement to the respondent whose assignor had paid the assessment in petitioner's behalf, is a question of general State law. The opinion of the Court of Appeals does, of course, make reference to section 64, which, it observes, indicates the intention of Congress that petitioner should bear the primary liability for the assessment (p. 466). But the statute only recognizes and does not create his liability to the respondent, which is rather created at common law. The question whether he is bound to reimburse respondent's assignor who was not the holder of record of the shares—argued at length below (pp. 464-7)—is wholly a common law question and does not arise under section 64. The opinion of Chief Judge Lehman, already quoted (p. 5), points this out clearly.

CONCLUSION

The petition for a writ of certiorari should be denied.

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